



PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Washington State Toxicologist

- ☒ Preproposal Statement of Inquiry was filed as WSR 04-12-050 ; or
☐ Expedited Rule Making--Proposed notice was filed as WSR _____; or
☐ Proposal is exempt under RCW 34.05.310(4).

- ☒ Original Notice
☐ Supplemental Notice to WSR _____
☐ Continuance of WSR _____

Title of rule and other identifying information: (Describe Subject)

Administration of Breath Test Program

Hearing location(s):

Washington State Patrol
Forensic Laboratory Services Bureau
2203 Airport Way S, Suite 360
Seattle WA 98134

Submit written comments to:

Name: Barry K. Logan, Ph.D.
Address: Washington State Toxicologist
2203 Airport Way S, Suite 360
Seattle, WA 98134
e-mail barry.logan@wsp.wa.gov
fax (206) 262-6018 by (date) August 31, 2004

Date: September 7, 2004 Time: 9:00 a.m.

Assistance for persons with disabilities: Contact

Kitty Jacobs by August 31, 2004

TTY () or (206) 262-6000

Date of intended adoption: September 14, 2004

(Note: This is NOT the effective date)

Purpose of the proposal and its anticipated effects, including any changes in existing rules:

Changes to RCW 46.61.506 have made sections of the current chapter 448-13 WAC redundant. The changes repeal many obsolete and redundant provisions, and move others from the Washington Administrative Code to agency policy and procedures. The proposed changes in rules are designed to simplify the administration of the breath alcohol test program used by law enforcement agencies, and administered by the Washington State Patrol. Due to the significant scope of changes, the prior rules WAC 448-13 are being struck in their entirety and replaced with proposed WAC 448-16.

Reasons supporting proposal:

The proposed rules are keyed specifically to the authority delegated in RCW 46.61.506 to the state toxicologist. The statute as revised and effective June 10th 2004 states: "The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist."

Statutory authority for adoption: RCW 46.61.506

Statute being implemented: RCW 46.61.506

Is rule necessary because of a:

- Federal Law? ☐ Yes ☒ No
Federal Court Decision? ☐ Yes ☒ No
State Court Decision? ☐ Yes ☒ No
If yes, CITATION:

DATE
July 30, 2004NAME (type or print)
Barry K. Logan, Ph.D.

SIGNATURE

TITLE: Washington State Toxicologist

CODE REVISER USE ONLYCODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED

JUL 30 2004

TIME

WSR

121
04-16-062

PM

(COMPLETE REVERSE SIDE)

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

None.

Name of proponent: (person or organization) Barry K. Logan, Ph.D.

- ☐ Private
☐ Public
☒ Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... Barry K. Logan, Ph.D.	2203 Airport Way S, Suite 360, Seattle, WA 98134	(206) 262-6000
Implementation....Barry K. Logan, Ph.D.	2203 Airport Way S, Suite 360, Seattle, WA 98134	(206) 262-6000
Enforcement..... Barry K. Logan, Ph.D.	2203 Airport Way S, Suite 360, Seattle, WA 98134	(206) 262-6000

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

☐ Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name:

Address:

phone () _____

fax () _____

e-mail _____

☒ No. Explain why no statement was prepared.

No small business impact. Only regulates government agencies.

Is a cost-benefit analysis required under RCW 34.05.328?

☐ Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name:

Address:

phone () _____

fax () _____

e-mail _____

☒ No: Please explain:

Agency compliance not required per section 5(a)(i).

REPEALER

The following chapter of the Washington Administrative Code is repealed: **Chapter 448-13 WAC - Administration of Breath Test Program.**

Chapter 448-16 WAC

ADMINISTRATION OF BREATH TEST PROGRAM

NEW SECTION

WAC 448-16-010 Basis for rules governing breath testing. In RCW 46.61.506 (4), the legislature establishes criteria for the admissibility of breath alcohol test evidence. RCW 46.61.506 (3) authorizes and directs the state toxicologist to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits to those individuals. These rules are intended to implement the direction of the statute by 1) approving instruments and associated equipment capable of performing a reliable breath alcohol test, 2) identifying classifications of individuals who are to be examined for their competence to conduct such tests, and operate or maintain that equipment, and 3) identifying certain aspects of the operation of that equipment, necessary for reliable testing.

NEW SECTION

WAC 448-16-020 Approval of breath test equipment. (1) Pursuant to RCW 46.61.506, the following instruments are approved for the quantitative measurement of alcohol in a person's breath:

- a) The DataMaster.
- b) The DataMaster CDM.

(2) Pursuant to RCW 46.61.506, the following thermometers are approved:

- a) Mercury in glass thermometers with a scale graduated in tenths of a degree measuring a range between 33.5 and 34.5 degrees centigrade.
- b) Digital thermometer system contained within the Guth 2100 wet bath simulator.

NEW SECTION

WAC 448-16-030 Definitions. (1) "Accuracy" means the proximity of a measured value to a reference value.

(2) "Alcohol" means the unique chemical compound ethyl alcohol.

(3) "Blank test" means the testing of an instrument to ensure that no alcohol from a previous test can interfere with a person's breath test.

(4) "Concentration" means the weight amount of alcohol, expressed in grams, contained in two hundred ten liters of breath or alcohol/water vapor.

(5) "Data entry" means the process of providing information through a keyboard to the instrument for the purposes of (a) identifying a breath test document to an individual and (b) statistical analysis.

(6) "Interference" means a test result whose infrared absorbance properties are not consistent with ethanol.

(7) "End expiratory air" means the last portion of breath to be delivered to the instrument once the appropriate sample acceptance criteria have been met.

(8) "External standard test" means the use of a simulator containing a certified simulator solution, to provide a known alcohol vapor concentration to test the accuracy and proper working order of the instrument. This test of the function of the instrument is performed with every breath test. The external standard test does not calibrate the instrument.

(9) "Internal standard test" means the use of a quartz filter to provide a check that the instrument has maintained calibration since the last time calibration was performed and is in proper working order at the time of the test.

(10) "Precision" means the ability of a technique to perform a measurement in a reproducible manner.

(11) "Simulator" means a device which when filled with a certified simulator solution, maintained at a known temperature, provides a vapor sample of known alcohol concentration.

(12) "Valid breath sample" means a sample of a person's breath provided in such a manner to be accepted for analysis by the instrument.

NEW SECTION

WAC 448-16-040 Foreign substances, interference, and invalid samples. (1) A determination as to whether a subject has a foreign substance in his or her mouth shall be made by either an examination of the mouth or a denial by the person that he or she has any foreign substances in their mouth. A test mouthpiece is not considered a foreign substance for purposes of RCW 46.61.506.

(2) If a subject is wearing jewelry or ornamentation pierced through their tongue, lips, cheek, or other soft tissues in the oral cavity, they will be required to remove this prior to conducting the breath test. If the subject declines, they will be deemed to have a physical limitation rendering them incapable of providing a valid breath sample and will be required to provide a blood sample under the implied consent statute, RCW 46.20.308.

(3) If during a breath test, interference is detected, this will invalidate the test. The subject will be required to repeat the test. A subject whose breath registers the presence of interference on two or more successive breaths shall be deemed to have a physical limitation rendering them incapable of providing a valid breath sample and will be required to provide a blood sample under the implied consent statute, RCW 46.20.308.

(4) In the event that the instrument records an "invalid sample" result at any point during the subject's test, that subject's test should be readministered, after again determining that the subject has no foreign substance in their mouth as outlined in WAC 448-16-040 (1), and repeating the fifteen minute observation period.

NEW SECTION

WAC 448-16-050 Test defined. A test of a person's breath for alcohol concentration shall consist of the person insufflating end-expiratory air samples at least twice into the instrument, sufficient to allow two separate measurements. There will be sufficient time between the provision of each sample to permit the instrument to measure each sample individually. Two valid breath samples, provided consecutively, will constitute one test.

The instrument will perform this test according to the following protocol when being employed to quantitatively measure an individual's breath alcohol concentration. Successful compliance with each step of this protocol is determined from an

inspection of the printout of results. These steps are necessary to ensure accuracy, precision, and confidence in each test.

Step 1. Data entry.

Step 2. Blank test with a result of .000.

Step 3. Internal standard verified.

Step 4. First breath sample provided by subject.

Step 5. Blank test with a result of .000.

Step 6. External standard simulator solution test. The result of this test must be between .072 and .088 inclusive.

Step 7. Blank test with a result of .000.

Step 8. Second breath sample provided by subject.

Step 9. Blank test with a result of .000.

Step 10. Printout of results.

NEW SECTION

WAC 448-16-060 Determining agreement of duplicate breath samples. Pursuant to RCW 46.61.506 the following method is approved for determining whether two breath samples agree to within plus or minus ten percent of their mean.

(1) The breath test results shall be reported, truncated to three decimal places.

(2) The mean of the two breath test results shall be calculated and rounded to four decimal places.

(3) The lower acceptable limit shall be determined by multiplying the above mean by 0.9, and truncating to three decimal places.

(4) The upper acceptable limit shall be determined by multiplying the mean by 1.1 and truncating to three decimal places.

(5) If the results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.

NEW SECTION

WAC 448-16-070 Review, approval, and authorization of protocols of procedures and methods by the state toxicologist.

The state toxicologist shall review, approve, and authorize such protocols of procedures and methods (of the toxicologist's own promulgation or submitted by outside agencies or individuals for consideration) required in the administration of the breath test program. Such review, approval, and authorization will be so signified by a signed statement attached to each protocol, and kept on file by the Washington State Patrol. These protocols will be updated as necessary to maintain the quality of the breath test program.

NEW SECTION

WAC 448-16-080 Instructors. The state toxicologist shall certify persons found to be competent and qualified, as "instructors." Instructors are authorized to administer breath tests for alcohol concentration using approved instruments and are further authorized to train and certify as operators, according to outlines approved by the state toxicologist, those persons the instructor finds qualified to administer the breath test utilizing approved instruments. Instructors who are also certified as PBT technicians may instruct other individuals as PBT technicians according to the approved outlines. Details of persons certified as instructors shall be maintained by the state toxicologist and available upon request.

If an instructor fails or refuses to demonstrate to the state toxicologist or to his representative, that they have the ability to adequately perform their responsibilities as an instructor, then the state toxicologist will suspend their permit.

NEW SECTION

WAC 448-16-090 Operators. The state toxicologist, or certified instructors shall certify as "operators" persons found by them to be competent and qualified to administer breath tests for alcohol concentration using approved breath testing instruments. Persons who have attended courses in the operation of approved breath testing instruments taught by an instructor qualified by the state toxicologist, upon certification of attendance and qualification, shall be designated as "operators." Details of persons so certified shall be maintained by the state toxicologist and available upon request.

If an operator fails or refuses to demonstrate to the state toxicologist or to a certified instructor, that he or she has

the ability to adequately perform his or her responsibilities as an operator, then the state toxicologist will suspend their permit.

NEW SECTION

WAC 448-16-100 Solution changers. The state toxicologist, or certified instructors, shall certify as "solution changers" operators found by them to be competent and qualified. In addition to being qualified as "operators" these persons must receive approved instruction covering the changing of simulator external standard solutions for approved breath test instruments, taught by an instructor qualified by the state toxicologist. Details of persons so certified shall be maintained by the state toxicologist and available upon request.

If a solution changer fails or refuses to demonstrate to the state toxicologist or to a certified instructor, that he or she has the ability to adequately perform his or her responsibilities as a solution changer, then the state toxicologist will suspend their permit.

NEW SECTION

WAC 448-16-110 Technicians. The state toxicologist shall certify as "technicians" such persons found to be competent and qualified to maintain the proper working order of breath test instruments through adjustment, repair, and regular service. Details of persons so certified shall be maintained by the state toxicologist and available upon request.

Technicians are authorized to perform maintenance, calibration and instruction in the use of the portable breath test devices. Technicians are also authorized to instruct persons otherwise qualified as "technicians", "instructors," "operators," and "solution changers" according to training outlines approved by the state toxicologist. Certified technicians are themselves authorized to perform the duties of "instructors," "operators," and "solution changers."

If a technician fails or refuses to demonstrate to the state toxicologist or his representative, that he or she has the ability to adequately perform his or her responsibilities as a technician, then the state toxicologist will suspend their permit.

NEW SECTION

WAC 448-16-120 Permit cards. Pursuant to RCW 46.61.506, the state toxicologist shall authorize the issuance to persons deemed qualified as "instructors," "operators," "solution

changers" or "technicians," a wallet-sized card bearing his or her name and designation. Permit cards shall bear the signature or facsimile signature of the state toxicologist. Such permit cards shall expire three years after the date on the card, unless renewed for a like three-year period. Operators whose authorization expires may take recertification training within ninety days following expiration of their prior certification, but are not certified to perform any evidential breath tests during that period. Once ninety days have elapsed after the expiration of authorization, the operator must repeat the basic certification training.

NEW SECTION

WAC 448-16-130 Review, approval, and authorization by the state toxicologist of training courses and outlines. The state toxicologist shall approve and authorize such courses and course outlines (of his own promulgation or submitted for consideration by outside agencies or individuals) required in the training of breath test program personnel. Such review, approval, and authorization will be so signified by a signed statement attached to each course outline. These course outlines may be reviewed and updated as necessary to maintain the quality of the breath test program. Instructors are directed to use only approved outlines in conducting the training of operators. Information concerning currently approved course outlines can be obtained on application to the office of the state toxicologist.

NEW SECTION

WAC 448-16-140 Information concerning technical aspects of the breath test program. Documents used by the state toxicologist and personnel involved in breath testing for the state of Washington, which are available on request include: The simulator solution preparation protocol, alcohol analysis protocol, certification document for simulator solution, affidavit from analyst of simulator solution, data base, quality assurance protocol, quality assurance procedure report, operator course outline, operator refresher course outline, and operator training record. A fee may be charged to cover the cost of providing these copies. Copies of most of these records are available at no charge on a web site maintained by the Washington State Patrol at <http://breathtest.wsp.wa.gov/welcome.htm>.

NEW SECTION

WAC 448-16-150 Address for correspondence. Information regarding instrument records, or the certification of operators, instructors, solution changers, and technicians should be

obtained from the Washington State Patrol, Breath Test Section, 811 E. Roanoke, Seattle, WA 98102.

Persons seeking information regarding other aspects of the breath alcohol testing program shall direct their request initially to the State Toxicologist, Washington State Toxicology Laboratory, Forensic Laboratory Services Bureau, Washington State Patrol, 2203 Airport Way S., Seattle, WA 98134.

NEW SECTION

WAC 448-16-160 Severability. If any part or provision of these rules or regulations or the application thereof is held invalid, such invalidity shall not affect other provisions or applications of these rules which can be given effect without the invalid provision or application, and to this end any section, paragraph or sentence, is declared to be severable.